69-1900-5072-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSURY

State of Minnesota, by
John B. Lennes, Jr., Commissioner,
Department of Labor and Industry,

Complainant,

V.

Albert J. Greenberg, M.D., P.A.,
Albert G. Greenberg, M.D., and
Janet Rhoe,

Respondents.

ORDER DENYING
RESPONDENT$' MOTION
FOR SUMMARY JUDGMENT

The above-entitled matter is before the Administrative Law Judge on Respondents' Motion for Summary Judgment. Complainant is represented by Nancy J. Leppink, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155. Respondents are represented by Mary R. Vasaly, Maslon, Edelman, Borman & Brand, 1800 Midwest Plaza, Minneapolis, Minnesota 55402. The record closed on this motion on March 25, 1991, upon receipt of Respondents' Reply Memorandum.

Respondent moves for summary judgment on the grounds that an employee fired by an employer who mistakenly believed the employee had filed an OSHA complaint is not protected by the provisions of Minn. Stat. 182.654, subd. 9, and 182.669, which prohibit retaliation against employees who make safety complaints.

ORDER

For the reasons set forth in the following Memorandum, it is HEREBY ORDERED that Respondent's Motion for Summary Judgment is DENIED.

Dated this 9th day of April, 1991.

STEVE M.MIHALCHICK
Administrative Law Judge

MEMORANDUM

Respondents have moved the Administrative Law Judge for an order granting summary judgment in their favor dismissing the complaint with prejudice on the grounds that the Complainant, State of Minnesota, has no standing to bring the complaint on behalf of Gloria M. Rodriguez, a laboratory technician discharged by Dr. Greenberg's professional corporation (Greenberg P.A.) on January 20, 1989.

The complaint alleges that Dr. Greenberg, as sole owner of Greenberg P.A., practiced medicine in Minneapolis. Janet Rhoe was his office manager. Ms. Rodriguez was employed by Greenberg P.A. on November 1, 1988, as a medical laboratory technician. On December 14, 1988, an occupational safety and health complaint was received by the Occupational Safety and Health Division (Division) from an employee of Greenberg P.A. other than Ms. Rodriguez alleging that there were certain occupational safety and health violations in the medical laboratory. On January 19, 1989, a representative of the state initiated an occupational safety and health inspection of Greenberg P.A.'s place of employment. He met with Ms. Rhoe and notified her that a complaint had been received and arranged to complete his inspection on January 24, 1989. On January 20, 1989, shortly after Ms. Rodriguez arrived at work, she met with Dr. Greenberg and Ms. Rhoe and was informed that they were terminating her employment with Greenberg P.A. because she had been late to work that day and on two prior occasions. The complaint also alleges, and Respondents strongly dispute, that Dr. Greenberg and Ms. Rhoe believed that Vs. Rodriguez had filed the OSHA complaint, fired her for that reason, and informed others that that was the reason she was discharged

The crux of Respondents' argument is that because Ms. Rodriguez is not the employee who filed the OSHA complaint, she is not entitled to the protections and remedies provided by the statutes and, therefore, the state has no jurisdiction to bring a claim on her behalf. Respondents' motion is in effect equivalent to a Rule 12.03 Motion for Judgment on the pleadings. However, the parties have presented additional materials outside the pleadings in the form of affidavits to support their particular allegations. Therefore, the motion is properly treated as a summary judgment motion under Rule 56 of the Minnesota Rules of Civil Procedure. Under Minn. Rule 1400.5500K, one of the duties of an administrative law judge is to recommend summary disposition of a case or any part thereof where there is no genuine issue as to any material fact. That rule contemplates the normal situation where the administrative law judge is making a recommendation to an agency head or board that makes the final decision. However, in this case, under Minn. Stat. 182.669, it is the administrative law judge who makes the final order. Therefore, since a summary disposition under the rules for contested cases is equivalent to a motion for summary judgment under the Minnesota Rules of Civil

Procedure, the administrative law judge may grant or deny a motion for summary judgment as appropriate applying the standards that apply to motions for summary judgment in district court.

For purposes of this motion, it is assumed that the facts as alleged in the complaint are true and that Ms. Rodriguez' employment was terminated by the Respondents because they believed she had filed a complaint against Greenberg P.A. with the Division.

Minn. Stat. 182.654, subd. 9, provides:

> Subd. 9. No employee shall be discharged or in any way discriminated against because such employee has filed any complaint or instituted or caused to be instituted any proceeding or inspection under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of the employee or others of any right afforded by this chapter. Discriminatory acts are subject to the sanctions contained in section 182.669.

Minn. Stat. 182.669, subd. 1, provides:

> 182.669 DISCRIMINATION.
>
> Subdivision 1. Any employee believed to have been discharged or otherwise discriminated against by any person because such employee has exercised any right authorized under the provisions of sections 182.65 to 182.674, may, within 30 days after such alleged discrimination occurs, file a complaint with the commissioner alleging the discriminatory act. Upon receipt of such complaint, the commissioner shall cause such investigation to be made as the commissioner deems appropriate. If upon such investigation the commissioner determines that a discriminatory act was committed against an employee, the commissioner shall refer the matter to the office of administrative hearings for a hearing before an administrative law judge pursuant to the provisions of chapter 14. In all cases where the administrative law judge finds that an employee has been discharged or otherwise discriminated against by any person because the employee has exercised any right authorized under sections 182.65 to 182.674, the administrative law judge may order payment to the employee of back pay and compensatory damages. The administrative law judge may also order rehiring of the employee; reinstatement of the employee's former position, fringe benefits, and seniority rights; and other appropriate relief. In addition, the administrative Law Judge may order payment to the commissioner or to the employee of costs, disbursements, witness fees, and attorney fees. Interest shall accrue on, and be added to, the unpaid balance of an administrative law judge's order from the date the order is signed by the administrative law judge until it is paid, at the annual rate provided in section 549.09, subdivision 1, paragraph (c). An employee may bring a private action in the district court for relief under this section.

On their face, neither of the statutes provide any protection or rights to any employee other than an employee who has filed a complaint, instituted a

proceeding or inspection, has testified or is about to testify in any such proceeding or has exercised any rights under the Occupational Safety and Health Act (the Act) on behalf of himself or herself or any other person. Minn. Stat. 182.655, subd. 9, states that no employee may be discharged or discriminated against because such employee engaged in the specified protected activities. Minn. Stat. 182.669, subd. 1, provides that where the Administrative Law Judge finds that an employee has been discharged or discriminated against because the employee exercised any rights provided under OSHA, the Administrative Law Judge may order certain remedies. In this case, Ms. Rodriguez is not the employee who exercised rights provided under OSHA and filed the complaint. Respondents urge that the statutes be applied literally according to their terms. Complainant urges that the statutes be interpreted broadly in light of the broad remedial purposes of the Act.

The general rule for applying statutes is found in Minn. Stat. 645.16, which provides in relevant part:

> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

The statute goes on to state that when the words of a law are not explicit the intention of the legislature may be ascertained by considering certain specified matters. Thus, there is no basis to interpret a statute broadly, when the statute is clear and unambiguous. State v. Carpenter, 459 N.W.2d 121 (Minn. 1990); Tuma v. Commissioner of Economic Security, 336 N.W.2d 702 (Minn. 1986); Commissioner of Revenue v. Richardson, 302 N.W.2d 23 (Minn. 1981). The only exception to this rule seems to arise when adherence to a statute's clear language would be inconsistent with the legislature's manifest intent. PathManathap v. St. Cloud State University, 461 N.W.2d 726 (Minn. App. 1990); Kugling v. Williamson, 231 Minn. 135, 42 N.W.2d 534 (1950); Minn. Stat. 645.08.

In Davis v. Boise Cascade Corporation, 288 N.W.2d 680 (Minn. 1979), the plaintiff was discharged after walking off his job due to what he considered to be intolerable and unsafe working conditions. He did not contact the Division to file a complaint. Instead, he filed a lawsuit in District Court alleging in one count that the employer had breached a union contract in failing to improve the working conditions and in a second count that the discharge was retaliation which violated requirements imposed on the employer under the act. With regard to the first count, the court affirmed the lower court's ruling that the plaintiff had inexcusably failed to pursue contractual remedies under the collective bargaining agreement. As to the second claim, the Supreme Court found no merit to the claim stating:

> It is clear that even if defendant had not complied with

regulations issued pursuant to ch. 182, nothing in that statute authorized plaintiff to leave big job to require compliance with the regulations. By his own admission he never discussed nor filed charges with the Department of Labor and Industry; thus he was not discharged because he had "exercised any right authorized under the provisions of sections 182.65 to 182.674.

The court also found that the statute accorded no right of action to individuals to enforce the statute. In Brevik v. Kite Painting Inc., 416 N.W.2d 714 (Minn. 1987), the plaintiff employees sued Kite alleging that they had been discharged from employment in retaliation for exercising statutory rights under the act. The plaintiffs were painters who had complained to the employer about poor ventilation on the job site, spoke to their supervisor about making a complaint to the Division and actually called the Division to complain. The next day, a Division agent inspected the site and found no violations. On the same day, the plaintiffs were fired and the parties stipulated that they were terminated because of the exercise of rights under the act. The employer argued that under Davis, Minn. Stat. 182.669 did not permit a private right of action for retaliatory discharge. The Brevik court stated:

> Under this analysis of Dayis, the court did not reach the broad conclusion suggested by Kite that section 182.669 does not authorize a private cause of action for retaliatory discharge. Rather, the holding of Davis that no private cause of action was authorized is limited to the situation where an employee sought to enforce MOSHA regulations in a private suit and never exercised any rights under MOSHA such as lodging a complaint regarding working conditions, We thus conclude that plaintiffs' private cause of action for retaliatory discharge is authorized by section 182.669.

Complainant argues that the Davis and Brevik decisions have no application because neither court was confronted with the issue of whether an employer may be held liable for terminating an employee because the employer believed the employee exercised a right authorized under the act. While that is true, Davis, as explained in Brevik, indicates that an employee must have exercised rights under the Act in order to have any rights under Minn. Stat. 182.669.

In Bryant v. Dayton Casket Co., 69 Ohio St.2d 367, 433 N.E.2d 142 (Ohio 1982), a workers' compensation statute provided:

> No employer shall discharge, demote, reassign, or take any punitive action against any employee because such employee filed a claim or instituted, pursued or testified in any proceedings under the Workers' Compensation Act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

The employee cut a finger while working on February 9, 1979. A few weeks

later, the employee was fired. He claimed it was because he had informed the company that he had injured himself and intended to file an industrial claim. The company claimed he was terminated for cause. The employee did not file a claim for workers' compensation until May 1, 1979, and then, on May 22, 1979, commenced an action in court alleging the wrongful discharge under the statute. The Ohio Supreme Court upheld a summary judgment in favor of the employer on the basis that the statute was clear and unambiguous and that the facts were that the employee had not filed a claim or instituted, pursued or

testified in any proceedings prior to his discharge. In a concurring opinion by Justice William Brown, the court recognized that its decision could cause negative affects in that it might encourage employers to fire employees before they filed workers' compensation claims, Thus, even where an employer might choose to engage in firing an employee in contravention of the broad policies of an anti-retaliation provision, the Ohio Supreme Court held that it could not broaden the statute's application beyond its clear and unambiguous terms.

In Bohn v. Cedarbrook Engineering Co., 422 N.W.2d 534 (Minn. App. 1988) the court reviewed an administrative law judge's decision under 182.669, holding that an employee's action was protected activity and that the employer illegally discriminated against him by terminating his employment for engaging in that activity. The findings in the case were that during an OSHA inspection, the employee remelted a barrel of contaminated scrap that filled the work area with smoke. This was a procedure that employees had previously complained about, which the employer had changed, but which was still done occasionally. The employee had been asked by other employees to remelt the scrap to demonstrate the problem that occurred with the smoke to the inspector. The administrative law judge found that the employee's demonstration was motivated by a desire to call attention to health concerns to the inspector and thus constituted a complaint and a protected activity under the Act. The employer argued that the employee's demonstration was not a complaint as required by the statute. The court stated:

> We are unpersuaded by Cedarbrooks' argument that the statute only protects those employees able to put their complaints in writing. The broad remedial purposes of the Act mandate liberal construction of its provisions, including the language "filed any complaint." See Donovan v. Ardy Anderson Construction Co., 552 F.Supp. 249, 252-53 (D.Kan. 1982) (federal court interpreting analogous federal statute).

The court noted that the Legislature had placed no explicit limitation on the types of complaints protected by the statute and cited another federal case interpreting the analogous federal statute to conclude that written or oral complaints made to employers as well as the OSHA division are protected activities. It then found no reason to distinguish between oral complaints

and demonstrations and affirmed the administrative law judge's decision.

The analogous federal provision to which the Bohn court referred was 29 U.S.C. 660(c)(1) and (2), which is the federal OSHA statute upon which Minn. Stat. 182.654, subd. 9, and 182.669 were patterned. In Donovan v. Peter Zimmer America Inc., 557 F.Supp. 642, 1982 CCH OSHD paragraph 26,154, (D.S.C. 1982), the court found that the employer had illegally discharged three employees in violation of that anti-retaliation provision. The three employees had complained to management about fumes and one of them had filed a complaint with the OSHA Division. The employer became very upset and attempted to find out which employee had filed the complaint. Upon failing to do so, the employer engaged in activity designed to make work in the area miserable for those employees and ultimately fired all three of them. Tie court concluded that the three employees were discharged in substantial part, if not entirely, because of their engagement in activity protected by the Act. The court also concluded:

> While Upton, Foster and Walker engaged in protected activity by complaining to management about the welding fumes, they are also protected because it is the Court's conclusion that their discharge came about as a result of Mr. Koch's inability to pinpoint the one employee who actually filed the OSHA complaint. Koch accordingly fired all three suspected "culprits", notwithstanding his mistake as to Upton and Foster. Such an approach brings the "innocent" parties under the umbrella of protected activity. See NLRB v. Hertz Corp., 449 F.2d 711, 714-715 (5th Cir. 1971): Hamilton Avnet Electronics, 240 NLRB 78, 791-792 (1979); Metropolitan Orthopedic Association, P.C., 327 NLRB 427, 429 (1978).

As Respondent points out, the NLRB cases relied upon by the court in Peter Zimmer America, Inc., were applying sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), which make it unfair labor practices for an employer to interfere with, restrain or coerce employees in the exercise of their right to organize and take concerted action and to encourage or discourage membership in any labor organization. This more general language permits the statutes to be construed to prohibit employer activity based on mistaken beliefs. Section 8(a)(4) of the National labor Relations Act. Section 8(a)(4) of the NLRA contains an anti-retaliation provision that is virtually identical to Minn. Stat. 182.654, subd. 9. Complainant has cited no case applying that provision to facts similar to those present here. Respondents cite Gibbs Corp., 131 N.L.R.B. 955, enforced, 308 F.2d 247 (1961) a case in which NLRB reversed a trial examiner's finding that an employer violated the anti-retaliation provision of the NLRA when it discharged an employee mistakenly believing the employee had filed charges. The NLRB also upheld the trial examiner's determination that the discharge did violate the provisions of Section 8(a)(1) of the NLRA.

Section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. 215(a)(3) contains an anti-retaliation provision that is virtually identical to Minn. Stat. 182.654, subd. 9. In Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987) the court upheld a district court finding that an employee, Banyas, had been fired by his employer, Richardson, who erroneously believed that the employee had filed a complaint against him with the Wage and Hour Administration, which enforces the Fair Labor Standards Act. The court then stated:

> Richardson next argues that the district court erred as a matter of law in applying section 15(a)(3) of the Fair Labor Standards Act. That section prohibits the discharge of or discrimination in any other manner against an employee "because such employee has filed any complaint or instituted or caused to be instituted any

proceeding under or related to [the Fair Labor Standards Act], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. sec. 215(a)(3),

Richardson argues that in order to prove a violation of section 15(a)(3), the government must show both that the

discharged employee engaged in one of the specified overt acts and that the employer was aware of the act. He contends that because Banyas did not in fact file a complaint, and because the court did not find that Banyas engaged in one of the acts specifically protected under the statute, there can be no violation of the statute. According to Richardson, the employer's mere belief that the employee has engaged in protected conduct is not enough.

The parties have directed us to no case, nor have we found one, considering whether an employer's belief that an employee has engaged in protected activity is sufficient to trigger application of section 15(a)(3). Nonetheless, we reject Richardson's argument that the section is inapplicable if the employer's perception turns out to be mistaken. The Fair Labor Standards Act is part of the large body of humanitarian and remedial legislation enacted during the Great Depression, and has been liberally interpreted. As the Court stated in Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944), in describing other provision of that Act:

> But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere c hattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

Id. at 597, 64 S.Ct. 703.

The anti-retaliation provision was designed to encourage employees to report suspected wage and hour violations by their employers. In Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), the Court explained why a work place environment conducive to employee reporting is important to the enforcement of the substantive rights created by the Fair Labor Standards Act:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free

> to approach officials with their grievances. This end the prohibition of 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. Cf. Holden v. Hardy, 169 U.S. 366, 397 [18 S.Ct. 383, 390, 42 L.Ed. 780] [1898]. By the proscription of retaliatory acts set forth in 15(a)(3), and its enforcement in equity by the Secretary pursuant to 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.

Id. at 292, 80 S.Ct. at 335. Thus, the Court has made clear that the key to interpreting the anti-retaliation provision is the need to prevent employees' "fear of economic retaliation" for voicing grievances about substandard conditions.

It follows that courts interpreting the anti retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language. For example, it has been applied to protect employees who have protested fair Labor Standards Act violation to their employers, see Love v. RE/MAX of America, In,., 738 F.2d 383, 387 (10th Cir. 1984), who have refused to release back pay claims or return back pay awards to their employers, see Marshall v. Parking Co. of America, 670 F.2d 141 (10th Cir. 1982) (per curiam); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 180-83 (8th Cir. 1975), and who have communicated with investigators from the Wage and Hour Division, see Daniel v. Winn-Dixie Atlanta, Inc., 611 F.Supp. 57 (N.D.Ga. 1985). In each of these instances, the employee's activities were considered necessary to the effective assertion of employees' rights under the Fair Labor Standards Act, and thus entitled to protection.

It is also of some relevance that section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), which makes it an unfair labor practice for an employer to discriminate in order to discourage membership in any labor organization, has been held to apply to protect employees even if they did not in fact engage in protected activity. Although we recognize that there are differences between the statutory language of section 8(a)(3) of the NLRA and section 15(a)(3) of the FLSA, NLRA cases are often considered of assistance in interpreting the Fair Labor Standards Act. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 723, 67 S.Ct. 1473, 1473-74, 91 L.Ed. 1772 (1947). Thus, in N.L.R.B. v. Ritchie Manufacturing Co., 354 F.2d 90, 98 (8th Cir.1966), the court held that the employer violated

> section 8(a)(3) by discharging an employee because of a belief that the employee was engaged in union activity, despite the absence of proof of actual union activity or membership by the employee in the union. See also N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 589-90, 61 S.Ct. 358, 361-62, 85 L.Ed. 368 (1941); Henning & Cheadle, Inc. v. N.L.R.B., 522 F.2d 1050, 1052 (7th Cir. 1975) (per curiam); N.L.R.B. v. Clinton Packing Co., 468 F.2d 953, 954-55 (8th Cir. 1972) (per curiam).
>
> It is evident that the discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations. For that reason, we conclude that a finding that an employer retaliated against an employee because the employer believed the employee complained or engaged in other activity specified in section 15(a)(3) is sufficient to bring the employer's conduct within that section. We therefore affirm the district court's holding on liability

(Footnote omitted). In Marshall v. Georgia Southwestern College, 489 F.Supp. 1322 (D.Ga. 1980), a husband and wife were professors at the college and the wife, along with other female educators there, made complaints to the college administration about receiving lower wages than their male counterparts. In retaliation, the college removed the husband from his position as head of the math division. The court found that to be a violation of 29 U.S.C. 215(a)(3), stating:

> Although this situation is unusual in that the spouse of one who complains and not the complainant herself is being discriminated against, Dr. Max McKinney's position is protected by 215(a)(3) to the same extent that his wife's position is protected. Otherwise the purposes of the statute could be subverted through indirect retaliations with impunity. Congress obviously did not so intend. The defendants have discriminated against Dr. Max McKinney because his wife, Dr. Jacqueline McKinney, caused this equal pay action to be instituted.

The Administrative Law Judge finds the Richardson decision persuasive because it deals with an identical statute applied to very similar facts by a Circuit Court of Appeals in a very thorough opinion. As noted above, the Minnesota Court of Appeals has held that the broad purposes of the Act mandate liberal construction of its provisions. Bohn v. Cedarbrook Engineering Co., 422 N.W.2d 534, 536 (Minn. App. 1988). The purpose of the Act is to assure so far as possible every worker in the state of Minnesota safe and healthful working conditions and to preserve the human resource. Minn. Stat. 182.65, subd. 2. The anti-discrimination and anti-retaliation provisions are in the statute because employers do discriminate and do retaliate against employees when they complain about the lack of safe working conditions. To allow an employer to mistakenly, or intentionally, discriminate and retaliate against

innocent employees or random employees when someone makes an OSHA complaint

would surely thwart the clear purposes of the Act by discouraging all employees from making such complaints. Minn. Stat. 182.654, subd. 9, and 182.669 must be read so as to apply to such situations; to do otherwise would be inconsistent with the Legislature's manifest intent.

SMM